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BY HAND

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Copyright Office
James Madison Building
101 Independence Avenue, S.E.
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Re: Docket No. 2001-2 CARP DTNSRA
Scheduling Order

Dear Bill:

I write on behalf of Music Choice in response to the Copyright Office's request for written comments in the above-captioned proceeding, in which a Copyright Arbitration Royalty Panel ("CARP") will set rates and terms for the statutory license for pre-existing subscription services and pre-existing satellite digital audio services to transmit digital sound recordings.[1] At this time, Music Choice is only a party in the above-captioned proceeding. Music Choice therefore takes no position in connection with the scheduling of multiple proceedings. However, we believe this is an important time to reiterate several issues that relate directly to the present situation.

1.) The Current Framework For Ratesetting Is Too Complex

Since 1993, ratesetting and adjustments of copyright royalties owed under the compulsory licenses of the Copyright Act have been entrusted to three-member ad hoc arbitration panels ("CARPs") appointed by the Copyright Office. See The Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (Dec. 17, 1993). In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRSA"),

[1] In its November 13, 2002 Order, the Copyright Office asks the parties to this proceeding to submit their proposals concerning the scheduling of the proceeding in light of the three proceedings currently before the Library. Order in Docket No. 2001-2 CARP DTNSRA (November 13, 2002). In a subsequent notice published in the Federal Register, the Copyright Office also asks parties intending to participate in the CARP proceeding to set rates and terms for eligible nonsubscription services and business establishment services to make digital transmissions of sound recordings to comment on the scheduling of that proceeding in light of the same scheduling issues. See 67 Fed. Reg. 70093 (Nov. 20, 2002).

Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995). In 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860, 2887 (Oct. 28, 1998). The DPRSA and the DMCA each set forth schedules for determining rates and terms under the various licenses.

As is readily apparent, the current licensing scheme administered by the Copyright Office consists of multiple licenses for multiple activities for multiple licensees. In some cases, the same licensee may need more than one license from the same copyright owner. These licenses may or may not operate on the same licensing schedule. Some licenses are adjusted on a two-year schedule, while other licenses are adjusted every five years. Different statutory standards apply to different ratesetting processes. This is a time-consuming, costly, and confusing process, even for the most sophisticated participant.

2.) The Ratesetting Process Bears No Relation To Market Realities

Even as Congress continues to amend an already knotty statutory scheme, ratesetting continues without regard to whether the patchwork "markets" defined by Congress actually reflect reality. In the marketplace, various music providers (e.g., broadcast radio, satellite services, pre-existing subscription services) compete. Under the statute, however, these services may be subject to different licensing mechanisms or may not be subject to licensing requirements at all. Depending on how services transmit their programming, they may or may not need more than one license. Unfortunately, the process of identifying whether a license is required and, if so, what "type" of license is more dependent on statutory interpretation than common sense.

Beyond the question of "whether" a license is required and "what" license in particular is the question of "how long" the license will last and "when" a new license will be available. As the Copyright Office rightly points out, the timing and scheduling of various licenses is unduly complex. Some performance licenses have an existing five-year term, which apparently cannot be modified or extended. Other performance licenses have a two-year term, which apparently can be modified and extended. Meanwhile, any user that requires a license to make so-called "ephemeral recordings" must participate in yet another proceeding to set those rates. These proceedings can only be scheduled every two years -- apparently without modification. Fundamentally, these provisions translate into an extremely formalistic licensing regime, which is over-complicated and reliant on hyper-technical distinctions. These distinctions may reflect back-room negotiations, but they have no relation to the marketplace in which Music Choice and its competitors operate.

3.) The Ratesetting Process Is Overly Burdensome For Individual Licensees

In its Order, the Copyright Office expresses frustration with the challenges of scheduling multiple arbitration proceedings for multiple licenses. This is only one of the many problems associated with the current licensing process. The statute builds in a period for voluntary

negotiation between the parties with the hope that the parties will reach a settlement and avoid arbitration. History has shown that negotiation and settlement are problematic and arbitration is rarely avoided. The breadth of the existing antitrust exemption encourages the Recording Industry Association of America ("RIAA") to negotiate exclusively on behalf of its members to the detriment of competition. Even more complicated, the record companies themselves are developing new services to compete with the very users who seek to negotiate with the RIAA. The cost of negotiation and potential litigation is much smaller in proportion to RIAA members' revenues than it is for any single user.

Negotiations are costly and interrupt business planning, as license terms vary or are indeterminate. Litigation before the CARP and Library of Congress with review by the D.C. Circuit is even more costly, exceeding the costs of litigation before the ASCAP and BMI "rate courts." The complexity of the statutory provisions imposes additional costs because, as a matter of practice, there are usually several issues that come up that require additional resources to resolve while in the middle of a proceeding. These issues usually require the input of all of the parties to a proceeding, as they frequently affect the outcome of the proceeding.[2] The result of all this is a closed decision making process in which only the largest stakeholders are able to fully participate in setting rates that apply to all copyright owners and users.

These hurdles and burdens also affect copyright owners. Royalties cannot be distributed until they are collected, and without rates in effect, users operate without knowing the terms under which they are operating. High rates may drive some users services out of business, resulting in copyright owners never being paid. Ultimately, the public is harmed, as the process does not protect against unfair outcomes and reduced choice in the market.

4.) The Ratesetting Process Must Be Reformed

Clearly, some form of CARP reform is necessary. As expressed most recently during consideration of H.R. 5469, the Small Webcaster Amendments Act of 2002, "the cost of participating in [CARP] proceedings [is] prohibitively expensive" and the ability of smaller parties to participate is unduly burdened by "procedural rules . . . ." S. 1113, 107th Cong. (2002) (Statement of Senator Leahy). In improving the current process, it is important to make participation less costly, especially for smaller entities and entities not represented by large collectives. Most importantly, this could be accomplished through rules that allow users to participate in the licensing process by submitting post-panel comments to the Librarian. As set forth in Music Choice's recently filed petition for rulemaking, the current process makes it easy for parties to "customize" an outcome that is applicable to non-parties, which can frustrate the goals of setting a truly fair rate by discriminating against those non-parties. The result in

[2] For example, in the most recent proceeding to establish rates and terms for certain eligible nonsubscription services and business establishment services, Docket. No. 2000-9 DTRA 1&2, the proceeding was halted so that the parties and the Copyright Office could work out issues regarding the definition of the term "service" and the affect of the license on broadcasters retransmitting their programming over the Internet.

the recent CARP for so-called "business establishment" users is a perfect example of such strategic behavior, where the record evidence was limited by the parties' express agreement.

Conclusion

Music Choice is prepared to proceed with its Direct Case in the current pre-existing subscription services proceeding. We appreciate the concerns that have been raised by other parties, but we do not believe there is a ready solution other than continuing on schedule to the extent possible.

The substantive and procedural complexities associated with multiple ratesetting proceedings are the result of a system that has arisen out of market failure and the desire by some to entangle Congress in the licensing process. The Copyright Office has been handed an imperfect mandate and burdened with the task of making it work. Now would seem the appropriate time to reiterate the need to reform the process before the substantive and procedural hurdles become even worse.

Sincerely,

Fernando R. Laguarda

cc: Melissa McDonald, Esq.
Beryl Howell, Esq.
Parties of Record

WDC 323461v2

SERVICE LIST
Docket No. 2001-1 CARP DSTRA2

I hereby certify that, on this 2nd day of December 2002, copies of the foregoing Letter was served by Facsimile on the following parties:

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